

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KENT GARVEY, ALBERT OVERHAUSER,
JAMES T. MARSH, ROGER E. BUCK, and
THOMAS LOVELESS, on behalf of themselves
and all others similarly situated,

Plaintiff,

v.

JAMES ARKOOSH AND
DIOMED HOLDINGS, INC.,

Defendants.

Civil Action No. 1:04CV10438 (RGS)

**DEFENDANTS' MOTION TO DISMISS THE
AMENDED CLASS ACTION COMPLAINT**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Diomed Holdings, Inc. ("Diomed") and James Arkoosh ("Mr. Arkoosh") (collectively "Defendants"), by counsel, respectfully move this Court to dismiss Plaintiffs' Amended Class Action Complaint for failure to state a claim. Specifically:

1. The entirety of the Amended Complaint is improperly pled on information and belief.
2. Defendants had no duty under the securities laws to disclose any alleged payments to third-party analysts.
3. Plaintiffs fail to allege even a single material misstatement or omission of fact in the analyst reports about which they complain.
4. Even if Plaintiffs had alleged any material misstatements or omissions of fact on the part of the analysts, Defendants could not be held legally responsible under the First Circuit's "entanglement" test.
5. The cautionary language or forward-looking statements in the analyst reports negate the materiality of any misstatements or omissions in those reports, had any been alleged.

6. Plaintiffs allege no facts giving rise to a “strong inference” that Defendants recklessly or intentionally defrauded Diomed stockholders in order to manipulate the market.
7. Plaintiffs failed to properly allege reliance to sufficiently state a claim under the securities laws.
8. Plaintiffs failed to state a claim for control person liability.

As set forth more fully in the accompanying Memorandum of Law, Defendants’ Motion to Dismiss should be granted in its entirety and with prejudice.

Pursuant to Local Rule 7.1(A)(2), counsel for Defendants certifies that the parties have conferred and attempted in good faith to resolve or narrow the issues in this case.

Respectfully submitted,

JAMES ARKOOSH and
DIOMED HOLDINGS, INC.

By Counsel

/s/ James J. Foster

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